ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
	)	IB Docket No. 97-142
Rules and Policies on Foreign	)	
Participation in the U.S.	)	
Telecommunications Market	)	

Comments of SITA

Albert Halprin
Randall Cook
Halprin, Temple, Goodman & Sugrue
Suite 650 East Tower
100 New York Avenue, N.W.
Washington, D.C. 20005
(202) 371-9100

Counsel for Société Internationale de
Télécommunications Aéronautiques

Dated: July 9, 1997

SUMMARY

SITA (Société Internationale de Télécommunications Aéronautiques), a worldwide provider of aeronautical enroute services to U.S. and international airlines, supports open and fair competition in all aeronautical enroute markets, including the United States. As the Federal Communications Commission ("FCC") implements the United States' World Trade Organization ("WTO") Basic Telecommunications Agreement obligations in this proceeding, SITA requests that the Commission conclude that (1) the United States' WTO commitments expressly include aeronautical enroute licenses among the basic telecommunications services to which indirect foreign ownership restrictions no longer apply; and (2) its current rule limiting aeronautical enroute licenses to "one station licensee per location," which has created a monopoly in aeronautical enroute services, is inconsistent with the United States' WTO commitments and is an unwarranted barrier to competition that should be removed.

Currently, the FCC restricts indirect foreign investment in, and ownership of, aeronautical enroute service licensees. Despite the United States' WTO commitment to remove indirect foreign ownership restrictions on basic telecommunications services, the FCC has not proposed to lift such restrictions for aeronautical enroute licenses. Instead, unlike other basic services covered by the WTO Basic Telecommunications Agreement ("the Agreement"), the FCC proposes to continue its *ad hoc*, case-by-case approach for evaluating whether to allow indirect ownership of aeronautical enroute licensees. Such an approach is inconsistent with the United States' pledge to allow indirect foreign ownership of U.S. basic telecommunications licensees, including mobile service licensees.

In addition, the Commission's rules authorize "only one aeronautical enroute station licensee at any one location," which has created a government-sanctioned monopoly in

aeronautical enroute services for a single private company to the exclusion of all others. Such an unwarranted barrier to competition is inconsistent with the United States WTO market access and national treatment commitments. As a result, the United States' WTO commitments and sound policy require that these two restrictions on aeronautical enroute services be removed.

Aeronautical enroute services, which provide basic voice and data transmission services, are basic telecommunications services. As such, they are covered by the United States' WTO commitments. Only those services specifically exempted by the United States are not covered by the Agreement's obligations. The United States only exempted one-way satellite transmissions of television services and digital audio services, but not aeronautical enroute services from its WTO obligations. As a result, the FCC should treat aeronautical enroute services the same as other basic services for the purpose of fulfilling the United States' WTO commitments to eliminate restrictions on indirect foreign ownership and provide market access and national treatment to the other Agreement signatories.

No valid reason exists to distinguish aeronautical enroute services from other basic services as a basis to exclude aeronautical enroute services from the United States' WTO obligations. Limiting the application of the United States' commitments by excluding aeronautical enroute services would not serve U.S. interests and would create incentives and loopholes for other countries to avoid their own WTO obligations. The result of such an approach would be to reduce the scope and effectiveness of the Agreement and create a smaller universe of basic services markets open to the United States and other countries.

Furthermore, maintaining the government-created monopoly in aeronautical enroute services would deprive users of the benefits of competition and stand in stark contrast to the longstanding U.S. policy of eliminating outdated barriers protecting monopolies and

promoting effective competition in the United States and abroad. Such a regulatory monopoly is an anachronism of a bygone era when regulators thought monopolies best served the public interest but which now contradicts the recognized benefits of competition and the numerous FCC assertions that increased competition is one of its primary goals.

The "one station licensee per location" rule is not required by statute, nor are any of the prior justifications for its existence sufficient to perpetuate a monopoly, particularly in light of the United States' WTO commitments. Continuing to sanction one of the last government-created monopolies would not serve the public interest. Furthermore, it could damage the United States' credibility after it has expended enormous effort to successfully convince other nations to join the Agreement. It also will harm the United States' continuing efforts to urge other countries to honor their commitments to open their markets and eliminate their own basic services monopolies in favor of competition.

This proceeding not only will fulfill the United States' commitments, it also will set the tone for how other countries implement their own WTO obligations. As a result, the FCC should eliminate its restrictions on indirect foreign investment and clarify that it will treat aeronautical enroute licenses the same as other basic services by permitting 100 percent indirect foreign ownership as required by the Agreement. In addition, the FCC should conclude that its current rule limiting the grant of aeronautical enroute licenses to "one station licensee per location" is inconsistent with the United States' WTO obligations and therefore should be eliminated or modified to permit competition in aeronautical enroute services in the United States.

TABLE OF CONTENTS

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
	)	IB Docket No. 97-142
Rules and Policies on Foreign	)	
Participation in the U.S.	)	
Telecommunications Market	)	

Comments of SITA

I. Introduction

SITA (Société Internationale de Télécommunications Aéronautiques) hereby comments on the Federal Communications Commission's ("Commission" or "FCC") Notice of Proposed Rulemaking ("NPRM") in the above-captioned proceeding. As a worldwide provider of aeronautical enroute services, SITA is interested in ensuring that full and fair competition exists in all aeronautical enroute services markets, including the United States.[1/]

This NPRM implementing the United States' commitments under the World Trade Organization ("WTO") Basic Telecommunications Agreement is extremely important. Not only does it fulfill the United States' promises, it will set the tone for how other countries

---

1/ SITA operates in virtually every country except the United States, providing U.S. and international airlines with data communications services, including airline operational control and administrative communications through its VHF AIRCOM service. This service operates in the 118-137 MHz radio frequency band, which is assigned internationally, as well as in the United States, to aeronautical mobile services. Signals for these services are transmitted directly between aircraft and ground stations linked to SITA's global communications network. Satellite communications or facilities, however, are not used by SITA to provide its VHF AIRCOM aeronautical enroute services.

implement their own WTO obligations. Other countries are watching the United States' implementation of its obligations closely, which in turn will significantly impact how those countries interpret and honor their commitments and, ultimately, whether the Basic Telecommunications Agreement fulfills its potential.

The NPRM, while focusing in large part on the "effective competitive opportunities" test,[2/] is the vehicle by which the Commission will fulfill the United States' WTO obligations by revising its rules governing the entry and operation of foreign-affiliated carriers in the U.S. market for basic telecommunications services. The Commission has proposed that, to fulfill the United States' WTO obligations, "indirect foreign ownership of common carrier radio licensees up to 100 percent should be presumed to be consistent with the public interest when the investor is from a WTO Member country, absent compelling evidence to the contrary."[3/] As a result, SITA requests that the Commission conclude that aeronautical enroute licenses also are among the basic telecommunications services to which indirect foreign ownership restrictions and the effective competitive opportunities test will not apply.

The Basic Telecommunications Agreement (also referred to herein as "the Agreement") covers all basic telecommunications services that are not specifically exempted.

[2/] In determining whether to waive the indirect foreign ownership limitations for common carrier radio licenses, the Commission established the "effective competitive opportunities" test to evaluate whether effective market access exists for U.S. carriers to obtain licenses for comparable services in a foreign applicant's primary market. *Market Entry and Regulation of Foreign-Affiliated Entities*, Report and Order, 11 FCC Rcd. 3873, paras. 23, 182 (1995) ("*Foreign Carrier Entry Order*").

[3/] *Rules and Policies on Foreign Participation in the U.S. Telecommunications Market*, IB Docket No. 97-142, Order and Notice of Proposed Rulemaking (released June 4, 1997) para. 10 ("*Foreign Participation NPRM*").

As a basic and a mobile service, aeronautical enroute services in the United States[4/] are covered by the Agreement and should be subject to the same WTO obligations as other basic services. Aeronautical enroute licenses should not be removed from the WTO commitments and subjected to the proposed *ad hoc*, case-by-case approach. The Commission therefore should conclude that the United States' WTO commitments require it to eliminate restrictions on indirect foreign investment for aeronautical enroute licenses at the same time and to the same extent as is proposed for common carrier licenses.

The Commission also should conclude in implementing the United States' WTO obligations that its rule limiting aeronautical enroute service licenses to "one station licensee per location," discussed below, should be eliminated or modified to allow competition in the provision of aeronautical enroute services in the United States. This rule establishes a monopoly in aeronautical enroute services for a single private company at the exclusion of all other entities, both foreign and domestic. As such, this unwarranted barrier to competition is inconsistent with the United States' WTO market access and national treatment commitments and therefore should be removed.

[4/] Aeronautical enroute services in the United States consist of air to ground communications (which may include voice, as well as data communications) for the operational control of aircraft by their operating companies. Such services are provided by private entities and usually include communications regarding aircraft services and supplies, fuel, aircraft performance, and weather. (As noted above in footnote 1, SITA provides its VHF AIRCOM services solely through data, rather than voice, communications.) Air traffic control communications, in contrast, are provided by the Federal Aviation Administration. It is the former, aeronautical enroute services market, to which SITA directs its comments.

II. Current Restrictions On Aeronautical Enroute Services

Two existing regulatory restrictions on aeronautical enroute services conflict with the United States' new WTO obligations. The first is the rule limiting indirect foreign ownership in aeronautical enroute service licensees. The Commission proposes continuing to apply this rule to aeronautical enroute licenses (in contrast to its proposal for common carrier licenses) notwithstanding the United States' commitment to remove indirect foreign ownership restrictions on basic telecommunications services. The second restriction is the FCC's outdated "one station licensee per location" rule creating a protected monopoly in aeronautical enroute services, which is inconsistent with the United States' WTO market access and national treatment obligations for basic telecommunications.

A. Indirect Foreign Ownership Restrictions

Foreign investment in, or ownership of, aeronautical enroute licensees in the United States currently is limited by the Communications Act and FCC rule. Specifically, Section 310 of the Communications Act prohibits any "alien" or any entity incorporated under the laws of another country from holding aeronautical, common carrier, or broadcast licenses.[5/] Furthermore, it imposes an absolute limit of 20 percent on direct foreign ownership of a licensee, while also giving the FCC authority to limit indirect foreign ownership of a licensee (*i.e.,* through a holding company) to 25 percent, if the Commission finds that it would be in the public interest.[6/] The Commission has interpreted this latter provision on indirect

---

[5/] 47 U.S.C. § 310(b)(1) and (2).

[6/] 47 U.S.C. §§ 310(b)(3) and (4).

ownership as giving it "discretion to allow higher levels of foreign ownership as long as the Commission determines that such ownership would not be inconsistent with the public interest."[7/] The Commission's rules governing aeronautical enroute services reiterate these foreign ownership limitations, including the authority to limit indirect foreign ownership in excess of 25 percent.[8/]

As part of its commitments in the WTO Basic Telecommunications Agreement, the United States pledged to allow indirect foreign ownership of U.S. basic telecommunications licensees, including mobile service licensees.[9/] To fulfill the United States' WTO obligations, the Commission tentatively concludes in the NPRM that indirect foreign ownership of common carrier radio licensees should be presumed to be consistent with the public interest.[10/] As a result, the Commission also proposes to eliminate the effective competitive opportunities test for such licenses. Nevertheless, the Commission has not proposed to lift indirect foreign ownership restrictions for aeronautical enroute licenses despite the Basic Telecommunications Agreement. Instead, it proposes to continue its *ad hoc*

7/ *Foreign Carrier Entry Order* at para. 179.

8/ 47 C.F.R. § 87.19. While establishing an effective competitive opportunities test to determine whether to waive the indirect foreign ownership limitations for common carrier radio licenses, the FCC declined to apply the test to foreign ownership above the 25 percent benchmark for aeronautical licenses, citing a lack of "historical guidance with respect to foreign ownership of aeronautical licenses." *Foreign Carrier Entry Order* at para. 182.

9/ Fourth Protocol to the General Agreement on Trade in Services ("WTO Basic Telecommunications Agreement"), United States' Schedule of Specific Commitments, Apr. 11, 1997, GATS/SC/90/Suppl.2. The United States, however, reserved the right to maintain restrictions on ownership of telecommunications service licenses by entities not incorporated in the United States and on direct foreign ownership of licenses.

10/ *Foreign Participation NPRM* at para. 10. The Commission notes "there would be a strong presumption that denial of the application [for a license involving indirect foreign investment] would not serve the public interest." *Id.* at para. 74.

approach for aeronautical licenses because it "see[s] no reason to change our case-by-case approach now."[11/]

B. Regulatory Monopoly for Aeronautical Enroute Services in the United States

The Commission's current rules governing aeronautical enroute services effectively preclude any potential new entrant, foreign or domestic, from offering aeronautical enroute services to commercial airlines in the United States. These rules grant both a *de jure* and *de facto* monopoly in aeronautical enroute services to a single U.S. company, Aeronautical Radio Inc. ("ARINC"), a private corporation primarily owned by the major U.S. scheduled airlines. The Commission's rules state expressly that "[e]xcept in Alaska, only one aeronautical enroute station license will be authorized at any one location."[12/] The term "location" is further defined as "the area which can be adequately served by the particular station."[13/] As a result, ARINC, which holds licenses for thousands of aeronautical stations across the United States that cover almost every "location" (as defined by the rule), has a

---

11/ *Id.* at para. 70.

12/ 47 C.F.R. § 87.261(c), hereinafter referred to as the "one station licensee per location" rule. In Alaska, the rules are similarly restrictive, authorizing only one aeronautical enroute station licensee for domestic service and one for international service at any one location.

13/ *Id.* The one limited exception to the one station licensee per location rule is Section 87.263(a)(3), under which two frequencies (122.825 MHz and 122.875 MHz) are available for assignment to aeronautical stations, subject to two stringent limitations: (1) the station must be used to "provide local area service to aircraft approaching or departing a particular airport," and (2) only commuter airlines (i.e., organizations operating aircraft with a capacity of up to 56 passengers or 18,000 pounds) are eligible for licenses to use these frequencies 47 C.F.R. § 87.263(a)(3). Thus, these stations are not a viable alternative means for an entity to offer nationwide or even regional large aircraft aeronautical services.

virtual monopoly for this basic telecommunications service.[14/] As the Commission itself noted, "ARINC is the sole licensee for aeronautical en route and fixed services in the conterminous United States and Hawaii."[15/]

C. Both Restrictions Should Be Removed

As discussed below, the indirect foreign ownership and one station licensee per location restrictions are inconsistent both with sound policy and the United States' WTO obligations. They stand in contrast to the practices of other major WTO trading partners, such as Mexico and Canada, which have authorized both ARINC and SITA to provide aeronautical enroute services.[16/] Further, the restrictions are inconsistent with the pro-competitive example set by the United States and its policy of pushing for open markets, which led to the successful conclusion of the Basic Telecommunications Agreement. The Commission's proposed approach to foreign ownership restrictions creates a difference in treatment between two types of basic telecommunications services -- common carrier radio

---

[14/] Since ARINC was formed in 1929 with the encouragement of the FCC's predecessor, the Federal Radio Commission, it has obtained licenses for thousands of aeronautical ground stations, covering virtually the entire country. Indeed, ARINC holds almost all aeronautical station licenses in the United States, except for a handful of licenses for stations used to provide "local area" service, usually in the immediate vicinity of an airport. *See Amendment of Part 87 to Clarify the Aeronautical Enroute Station Rules and Provide Two Additional Frequencies for Use by Small Aircraft Operating Agencies*, Report and Order, 87 F.C.C.2d 382, paras. 11, 12 (1981) ("*Part 87 Amendment Order*"). *See also* Comments of ARINC in *Market Entry and Regulation of Foreign-Affiliated Entities*, Notice of Proposed Rulemaking, 10 FCC Rcd. 5256 (1995) at 3 (noting that ARINC holds more than 5,000 individual aeronautical licenses).

[15/] *Foreign Carrier Entry Order* at para. 195.

[16/] In fact, most countries have no limitation on the number of aeronautical enroute licenses authorized per location, as compared to the United States, where the FCC's rule protects ARINC from competition.

service and aeronautical enroute service -- that is unnecessary and unjustified. As a result, the indirect foreign ownership and "one station licensee per location" restrictions should be removed.

III. Aeronautical Enroute Services Are Covered Under The Basic Telecommunications Agreement

The United States commitments in the WTO Basic Telecommunications Agreement apply to all basic telecommunications services in the United States, including mobile services.[17/] While the United States' WTO commitments do not refer explicitly to aeronautical services (nor to many other specific mobile services such as specialized mobile radio, automated maritime telephone service, and public coast service), aeronautical enroute services involve the provision of basic voice and data transmission services. As such, they fall within the definition of basic telecommunications services and thus are covered by the United States' WTO commitments. Furthermore, to the extent that aeronautical enroute services are considered to be mobile services, they also would be covered under the United States' specific WTO commitment regarding those services.

The absence of a specific reference to aeronautical enroute services does not remove that service from the United States' WTO obligations. The schedules listing countries' WTO commitments are not intended to comprehensively list all types of basic services covered by the Agreement. If such were the case, explicit reservations made by the WTO countries exempting certain unlisted services from their WTO commitments would not have been

---

17/ *See* WTO Basic Telecommunications Agreement, United States' Schedule of Specific Commitments. The United States only specifically exempted one-way satellite transmission of direct-to-home and direct broadcast satellite television services and digital audio services from these commitments.

necessary. As a result, only those basic services specifically exempted are not subject the Basic Telecommunications Agreement commitments. In its schedule of commitments, the United States only exempted "one-way satellite transmissions of Direct-to-Home and Direct Broadcast Satellite television services and digital audio services" from its WTO obligations for basic services.[18/] The United States explained that "[t]his technical change is required because these services are considered basic telecommunications in the United States," but the United States chose not to include them as part of the negotiations.[19/] That is, unless the United States had exempted these services, they would have been subject to the United States' market-opening obligations under the Agreement. In contrast, aeronautical enroute services, which also qualify as a basic services, were not excluded by the United States and thus are part of its WTO commitments.

Many other countries' commitments, like that of the United States, make clear that WTO obligations apply to all basic telecommunications services, including aeronautical enroute services. For example, the European Community confirms that its schedule "includes all subsectors of basic telecommunications services."[20/] This reflects the understanding that all basic services are covered by the Basic Telecommunications Agreement unless specifically exempted -- something the United States has not done for aeronautical enroute services. The FCC itself has stated that "[t]he U.S. commitment covers local, long distance, and international telecommunications services, provided by wire or

---

[18/] WTO Basic Telecommunications Agreement, United States Schedule of Specific Commitments and List of Article II (MFN) Exemptions.

[19/] WTO Basic Telecommunications Agreement, United States Conditional Offer, February 12, 1997, S/GBT/W/1/Add.2/Rev.1.

[20/] WTO Basic Telecommunications Agreement, European Communities and Their Member States Schedule of Specific Commitments, Apr. 11, 1997, GATS/SC/31/Suppl.3.

radio, on a facilities basis or through resale."[21/] Aeronautical enroute services clearly are encompassed within this classification.

Additionally, no valid reason exists for distinguishing aeronautical enroute licenses from other basic services also covered by the Agreement. The fact that aeronautical enroute service is a private service, rather than a common carrier service, is not a basis for excluding aeronautical enroute services from WTO commitments absent a specific exemption in the Agreement. Where private services are distinguished from public services for purposes of the relevant obligations, WTO members have done so explicitly.[22/] If the Agreement only covered public services, it would have been unnecessary for WTO members to make such references and distinguish between the two sectors.

Limiting the application of U.S. WTO commitments to public telecommunications transport services also would not serve U.S. interests and would create a loophole by which countries could avoid their own WTO obligations. Under an interpretation that the U.S. WTO commitments are limited to public services, many existing and future services would fall outside the scope of WTO obligations because they are not "offered to the public generally." For example, specialized mobile radio, automated maritime telephone service, and public coast service, to name a few, would not be subject to the market opening obligations of the Basic Telecommunications Agreement. If the Commission adopted a

---

21/ *Foreign Participation NPRM* at para. 1.

22/ *See, e.g.*, Brazil's schedule of commitments that distinguishes between private and public services obligations. WTO Basic Telecommunications Agreement, Brazil's Schedule of Specific Commitments, Apr. 11, 1997, GATS/SC/13/Suppl.2. *See also* the European Communities commitments noting that both public and non-public services are covered by the Agreement. WTO Basic Telecommunications Agreement, European Communities Schedule of Specific Commitments.

public-private distinction, other countries almost certainly would follow the FCC's approach and similarly limit their own commitments.

In addition, "carrier's carriers" that do not offer service to the general public also might be excluded from WTO requirements under an interpretation limiting the Agreement to public services. Such an approach by the FCC would encourage countries to exempt their own current carrier's carriers, such as Teleglobe of Canada and Cellnet & Vodafone in the United Kingdom, for example. Others also would follow the Commission's lead and adopt a carrier's carrier model as a means to justify maintaining or creating national monopolies and avoid WTO obligations.

In the end, this would significantly reduce the scope and effectiveness of the Basic Telecommunications Agreement. The result would be a smaller universe of basic telecommunications services that would be opened to the United States and others as countries used a public-private, or other, distinction to perpetuate restrictions in sectors the United States currently believes are covered by WTO commitments. As ARINC itself has strongly advocated, the FCC "should actively pursue opportunities to reduce the legions of unnecessary and antiquated obstacles other nations now place in the path of users and service providers seeking to operate private or public telecommunications networks abroad."[23/] The FCC also should do so domestically.

Consensus on the scope of WTO commitments is desirable given the divergent views on the breadth of the Basic Telecommunications Agreement that might arise among countries because of their different legal systems, definitions, characterizations, or other factors. The

---

23/ Comments of ARINC and Air Transport Association of America in *Regulatory Policies and International Telecommunications*, Notice of Inquiry and Notice of Proposed Rulemaking, 2 FCC Rcd. 1022 at iv. (1987).

FCC can take the lead in developing such consensus and set the tone for WTO implementation in this proceeding. Other countries are watching the United States closely to see how it implements its obligations.[24/] As a result, the FCC should not seek to limit the United States' commitments, but should honor them and strive for the broadest range of covered services possible in order to help ensure its goal of increasing competition and opening markets under the Agreement.

Consistent with the classification of aeronautical enroute services as basic telecommunications and mobile services, the absence of a valid reason or specific WTO reservation to exclude aeronautical enroute services from the U.S. commitments, and the good policy basis, the Commission should conclude aeronautical enroute services are covered by the Basic Telecommunications Agreement.

IV. The FCC Should Eliminate Restrictions On Aeronautical Enroute Services That Are Inconsistent With The WTO Regime And The Basic Telecommunications Agreement

As a basic service, aeronautical enroute services are subject to WTO obligations and should be treated the same as other basic services for the purpose of fulfilling the United States' WTO commitments by January 1, 1998. Therefore, the Commission should establish definitively for aeronautical enroute licenses that, as it proposes for common carrier radio

---

24/ *See, e.g., French Regulator Confirms Commitment to Opening Markets*, Communications Daily, June 17, 1997 at 3, 4 (Jean-Michel Hubert, President of France's Authorité de Régulations des Télécommunications noted that, in commenting on evaluating the FCC's implementation of WTO commitments, "[w]e shall be very attentive to this point."). *See also* U.S. Moves in Telecom Deregulation Have Global Implications, Washington Telecom News, June 9, 1997 (quoting National Telecommunications and Information and Administration Administrator Clarence (Larry) Irving as saying, "[t]he whole world is watching. We have to do this [implementation] right. We can't afford to do it wrong.").

licenses, indirect foreign ownership will be presumed consistent with the public interest and that no "effective competitive opportunities," or similar, test is necessary. Furthermore, the Commission should find that the one station licensee per location rule is inconsistent with WTO market access and national treatment obligations and should be eliminated or modified to allow competition in the provision of aeronautical enroute services in the United States.

A. Indirect Foreign Ownership Restrictions On Aeronautical Enroute Services Should Be Eliminated

The United States has committed to allow indirect foreign ownership without restriction for basic telecommunications services as part of its WTO obligations. As a basic service, aeronautical enroute service is subject to this commitment. The Communications Act permits the FCC to implement such a commitment by allowing up to 100 percent indirect foreign ownership in aeronautical enroute services.[25/] Furthermore, the same provision also applies to common carrier licenses and does not treat common carrier or aeronautical enroute services differently with regard to indirect foreign ownership.

As a result, aeronautical enroute services should be treated the same as common carrier services by the Commission for the purpose of meeting the United States' WTO obligations. If the Commission concludes, as it proposes, that implementing the Agreement requires that "indirect foreign ownership of common carrier radio licensees up to 100 percent should be presumed to be consistent with the public interest when the investor is from a

---

25/ 47 U.S.C. § 310(b)(4).

WTO Member country, absent compelling evidence to the contrary,"[26] then it should do the same for aeronautical enroute services.

It is worth noting that the Commission's proposal to evaluate aeronautical license applications involving indirect foreign ownership on an *ad hoc*, case-by-case basis (rather than based on a presumption of acceptability given to common carrier licenses) conflicts with other WTO provisions. The vagueness of an *ad hoc* approach could be regarded as discriminatory and is likely to conflict with the General Agreement on Trade in Services' provisions that require "measures related to domestic regulation to be reasonable, objective, impartial, and transparent."[27]

With regard to the "transparency" provision, the General Agreement on Trade in Services requires member countries to publish "all relevant measures of general application, which pertain to or affect the operation" of that agreement,[28] which now includes the annexed Basic Telecommunications Agreement. While the Commission may be "publishing" its requirements (i.e., minimally noting its "case-by-case" approach), this hardly provides the guidance or "specific information"[29] to other parties about how the United States will fulfill its WTO obligations as the transparency requirement envisions. Such an *ad hoc* approach, lacking in generally applicable rules, creates an opportunity to discriminate and creates an uncertain regulatory environment. The Commission itself has recognized the uncertainty inherent with an *ad hoc* approach. The Commission admitted that its prior *ad hoc*, case-by-

---

[26] *Foreign Participation NPRM* at para. 11.

[27] *Id.* at para. 22.

[28] General Agreement on Trade in Services, Apr. 15, 1994, 33 I.L.M. 1167, art. III(1) (1994).

[29] *Id.* at art. III(4).

case approach for Section 214 licenses "caused some uncertainty in the market because of the lack of a clear standard for evaluating applications by foreign carriers . . . ."[30/] It is precisely this uncertainty and lack of clear standards that the transparency requirement is designed to prevent.

The General Agreement on Trade in Services also imposes a requirement that domestic regulation be "administered in a reasonable, objective and impartial manner."[31/] This requirement specifically seeks to ensure that "licensing requirements do not constitute unnecessary barriers to trade in services."[32/] A case-by-case licensing approach without clear guidelines runs the risk of posing such a barrier. The WTO provisions further require that licensing requirements be "based on objective and transparent criteria, such as competence and the ability to supply the service;" not create requirements "more burdensome than necessary;" and not constitute a "restriction on the supply of the service."[33/]

The case-by-case licensing procedure, without clear, published rules appears neither "objective or transparent." It seems unlikely with such an approach that the criteria used in determining acceptable levels of foreign ownership would be limited to the objective criteria described (i.e., an applicant's competence and ability to supply the service). Failure to allow indirect foreign ownership in covered basic services also would conflict with the provisions prohibiting restrictions on trade in services. These WTO obligations provide yet another reason why the Commission should use this opportunity to eliminate its restrictions on

---

30/ *Foreign Market Entry* Order at para. 22.

31/ General Agreement on Trade in Services, art. VI(1).

32/ *Id.* at art. VI(4).

33/ *Id.* at arts. VI(4) and (5).

indirect foreign investment and clarify that it will treat aeronautical enroute licenses the same as other basic services by permitting 100 percent indirect foreign ownership as required by the Basic Telecommunications Agreement.

B. The One Station Licensee Per Location Rule Perpetuates A Monopoly In Aeronautical Enroute Services And Should Be Eliminated

The United States committed itself to granting market access and national treatment[34/] for basic telecommunications services to other signatories to the Basic Telecommunications Agreement.[35/] In addition to pledging to eliminate indirect foreign ownership restrictions to fulfill its obligations, the Commission also should eliminate or modify its current rules governing aeronautical enroute services that effectively preclude foreign, or other, entities from obtaining aeronautical enroute licenses in the United States.

The effective bar against any entity except ARINC holding aeronautical enroute licenses for large plane service in the United States appears to conflict with the United States' commitments in the WTO Basic Telecommunications Agreement. The U.S. Government, in a wide variety of fora, has consistently rejected contentions by other WTO members that regulations allowing a monopoly in any basic telecommunications service would be consistent with WTO obligations. The Commission noted at the very beginning of this NPRM that, as a result of the WTO negotiations to enforce fair rules of competition, "most of the world's major trading nations have made binding commitments to transition

---

34/ The Commission summarized national treatment as the obligation of "a WTO Member to treat companies from other WTO Members as it treats its own companies." *Foreign Participation NPRM* at para. 22.

35/ *See* General Agreement on Trade in Services, arts. XVI and XVII.

rapidly from monopoly provision of basic telecommunications services to open entry and procompetitive regulation of these services."[36/] Maintaining a monopoly also would not comport with U.S. policy objectives. The Commission has made clear that its "primary goal is to advance the public interest by promoting effective competition in the U.S. telecommunications services market, particularly the market for international services."[37/]

The fact that the one station licensee per location rule appears to discriminate equally against potential foreign and domestic service providers does not relieve the United States of its obligations to remove the restriction. The exclusion of both domestic and foreign entities from competing with the monopoly provider does not make it "facially neutral." This arrangement still affords privileged treatment to a private domestic entity at the exclusion of foreign entities in conflict with market access commitments and the national treatment obligation, which provides that member countries "shall accord to services and service suppliers . . . treatment no less favourable than it accords to its own like services and service suppliers."[38/]

Moreover, the one station licensee per location rule is an anachronism in a new era of competition. It is a vestige of a bygone era when extensive regulation was the norm and regulated monopolies were thought to be the best way to serve the public interest. This is no longer the case and, therefore, such a rule is unnecessary and inappropriate. The

---

36/ *Foreign Participation NPRM* at para. 2.

37/ *Id.* at para. 25. As Chairman Hundt has noted, the "policies of monopoly . . . cannot easily be defended." He often has remarked that competition is the right telecommunications model, which is now generally accepted in developing countries, but the "challenge in European and most other developed countries, *including the U.S.*, is to bring practice in line with principle." Chairman Reed Hundt, "To Build One World, Only Connect," Speech before the Asia Society, Hong Kong (October 11, 1996) (emphasis added).

38/ General Agreement on Trade in Services, art. XVII(1).

Commission now recognizes the advantages of competition, which has become a primary policy objective and has played a significant role in the development and expansion of telecommunications markets, as well as the conclusion of the WTO negotiations.[39/] As the Commission emphatically stated, "[i]n the old regulatory regime[,] government encouraged monopolies. In the new regulatory regime, we and the states remove the outdated barriers that protect monopolies from competition and affirmatively promote efficient competition . . . . "[40/] FCC Chairman Hundt noted in particular that the WTO Agreement "overthrows the monopoly paradigm in favor of the competition model in 69 countries around the world."[41/]

Monopolies, such as the one maintained by the one station licensee per location rule, are not the best way to serve the public interest. In this NPRM, the Commission points out that effective competition in the U.S. market is "our primary goal"[42/] and Chairman Hundt

---

39/ As FCC Chairman Hundt noted, the success of competition demonstrated in the United States and a handful of other countries led to the successful opening of markets in the Basic Telecommunications Agreement. *See WTO Telecom Agreement: Results and Next Steps Before the Subcomm. on Telecommunications, Trade, and Consumer Protection of the House Comm. on Commerce*, 105th Cong., 1st Sess. (March 19, 1997) (statement of Reed Hundt, Chairman, FCC) ("House Commerce Committee Testimony of Chairman Hundt").

40/ *First Report and Order, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd. 15499, para. 1 (1996). This commitment to competition extends to all sectors. As the Commission noted, the 1996 Telecommunications Act, which opens "one of the last monopoly bottleneck strongholds in telecommunications . . . is intended to pave the way for enhanced competition in *all* telecommunications markets, by allowing all providers to enter all markets." *Id.* at para. 4 (emphasis included).

41/ Chairman Reed Hundt, Remarks at the Schroder Wertheim Media Conference (April 1, 1997).

42/ *Foreign Participation NPRM* at para. 25.

has committed to "ensure we have the right rules in place" to ensure fair competition.[43/] As Chairman Hundt has pointed out, "[g]overnments around the world have realized that it is in their own self interest to open their markets to competition."[44/] This is equally applicable to the United States. It is in the United States' interest to open its market by eliminating this remaining regulatory monopoly to meet its policy goals of greater competition in the United States and worldwide, in addition to fulfilling its WTO commitments.

The one station licensee per location rule is not required by any statute. Furthermore, the prior rationalizations for the one station licensee per location rule, such as spectrum scarcity and coordination concerns, are simply not sufficient to maintain the rule, particularly in light of the United States' new WTO commitments. Sharing of spectrum and coordination of available frequencies among providers is now a common practice in a range of services, and shows that such concerns can be addressed and need not remain a barrier to competition.[45/] This is particularly true for the aeronautical data services SITA provides, which would only require a single channel (from among over 120 channels assigned to aeronautical services) to provide data service for the entire United States. When the Commission evaluated its aeronautical enroute services rules in 1981, the Commission thought a monopoly would result in "(1) services at rates closer to costs, (2) better

---

[43/] House Commerce Committee Testimony of Chairman Hundt.

[44/] *Id.*

[45/] In fact, ARINC and SITA operate, or are permitted to operate, in competition with each other in numerous countries. The lack of legal obstacles to receiving aeronautical enroute licenses in virtually every country, except the United States, is illustrated by SITA's ability as a foreign applicant to receive aeronautical enroute service authorizations in 141 countries and territories for its VHF AIRCOM service.

management of communications networks, (3) efficient use of available spectrum, and (4) [an] additional incentive for research and development."[46] It has since argued in numerous other proceedings that competition, not monopolization, will bring these benefits. The incentives competition creates will bring lower rates, better management, more efficient use of resources, and provide the impetus for research and development, which leads to infrastructure improvement and investment. As the Commission recognized in commenting on its regulation of the U.S. international telecommunications market, effective competition in the United States "promotes opportunities for U.S. consumers to choose among multiple suppliers based on innovative offerings, service quality and efficiencies, and price competitiveness."[47]

To permit, and in fact sanction through regulation, the monopoly protected by the one station licensee per location rule would not be in the public interest. The United States' credibility could be damaged and it could be regarded as hypocritical if it maintained a government-created monopoly, while urging other nations to open their markets. Maintaining this monopoly in the United States would encourage other countries to do the same in their basic telecommunications markets. Failure to remove the rule would undermine the United States' ability to persuade other countries to eliminate their regulatory monopolies and jeopardize its ability to contest others' lack of compliance with the Agreement under the WTO dispute settlement provisions.[48] Also, this monopoly rule runs

---

[46] *Part 87 Amendment Order* at para. 16.

[47] *Foreign Participation NPRM* at para. 25.

[48] The dispute settlement provisions of the Understanding on Rules and Procedures Governing the Settlement of Disputes in Annex Two of the Agreement Establishing the World Trade Organization apply to the Basic Telecommunications Agreement through Article XXIII of the General Agreement on Trade in Services.